IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 468 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GUJARAT STATE FOREST DEVELOPMENT CORPORATION LTD.

Versus

SHREE VANRAJSINGH GOVUBHA GOHIL

Appearance:

MR PM MEHTA FOR MIS NANAVATI ASSOCIATES for Petitioner

MR YOGESH S LAKHANI for Respondent No. 1

MR BY MANKAD, APP for Respondent No. 2

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 24/09/2001

ORAL JUDGEMENT

1. Rule. Learned Advocate Mr. Y.S. Lakhani waives for respondent No.1 and learned APP Mr. B.Y. Mankad waives for respondent No.2 - State of Gujarat. With the consent of the learned Advocates appearing for the

parties, this Revision is finally heard today.

2. This Revision Application is filed by original complainant of Criminal Case No. 915 of 1990 decided against the judgment and order dated 18th June, 1998, passed by the Judicial Magistrate, First Class, Talaja, District Bhavnagar, whereby the learned Judicial Magistrate acquitted the accused respondent No.1 herein for the charges levelled against him under Section 409 of the Indian Penal Code.

3. As per the brief facts of the case, Project Manager of Forest Development Corporation Limited, Rajkot, Mr.Dipak Parshottam, field a complaint before Talaja Police Station which was registered as Crime Register No. I-60/90 on 20th June, 1990. The complainant stated in the complaint that he was working as Project Manager in Forest Development Corporation Limited and the whole of Saurashtra including Talaja was under his jurisdiction. The accused Mr. V.G. Gohil respondent No.1 herein was working as Assistant Project Supervisor at the relevant time. It was the duty of the accused to collect forest produce and to store the same. As per the complaint, the accused in the year 1989, stored 9,000 bags of coal, 62.69 quintals of honey and 70.2 quintals of gum, and this, along with the other stock of the forest produce was shown on the stock register. It is stated in the complaint that, for this, an amount of Rs. 3,57,000/- was paid to the accused and regularly accused was taking bills from their office. Thereafter, in September 1989, the complainant verified the stock and found that the bags of coal was found 3,325 in place of 9,000 bags. While the stock of gum was nil and the other things including honey was appropriate, and accordingly, the above mentioned stock in the custody of the accused was found less and the departmental proceedings was initiated against the accused. For this on 28.10.1989, the amount of Rs. 75,000/- and on 1st December, 1989, an amount of Rs. 96,295/- was recovered from the accused. Thereafter, on 22nd May, 1990, the complainant undertook physical verification of the stock of the forest produce which were in the custody of the accused and he found that instead of 3,325 bags of coal, only 300 bags were there. While instead of 62.69 quintals of honey only 17.90 quintals was found and, therefore, according to the complainant, the accused had committed misappropriation to the extent of Rs. 1,35,650/-. As per the complaint, the accused admitted in writing in respect of this misappropriation and departmental proceeding was initiated after obtaining sanction from the Head Office. The papers in respect of

misappropriation by the accused were provided to the DSP, Bhavnagar. D.S.P., Bhavnagar sent those to Talaja Police Station and in pursuance of sending papers by the D.S.P., Bhavnagar, complaint was recorded by Police Station Officer, Talaja as above wherein the complainant also stated that all the necessary documents will be provided to the Investigating Officer during investigation. After the investigation, a charge sheet was filed against the present respondent No.1 i.e. accused under Section 409 of the IPC. It was alleged in the charge sheet that while the accused was working as Assistant Project Supervisor in Forest Development Corporation from September 1989 to 22nd May, 1990, he misappropriated Rs. 1,35,650/- by selling the stock of coal and honey and converted the said amount for his personal use. A charge was framed against the accused vide Exh.8 to which he pleaded not guilty, and hence the prosecution produced the evidence and after hearing both the parties, the learned Trial Judge came to the conclusion that the prosecution failed to prove the case against the accused under Section 409 of the Indian Penal Code and the accused was acquitted. Being aggrieved, this Revision Application is filed by the Gujarat State Forest Development Corporation Limited, stating that the State of Gujarat has not preferred Appeal against the said order and the record and proceedings of Criminal Case No. 915/90 of the Court of learned Judicial Magistrate, First Class, Talaja, be called for. The order of acquittal passed on 18th June, 1998 by the learned Magistrate be quashed.

4. Learned Advocate Mr. P.M. Mehta for M/s Nanavati Advocates, learned Advocate Mr.Y.S. Lakhani for respondent No.1 and learned APP Mr. B.Y. Mankad for respondent No.2 State of Gujarat, were heard.

5. It was vehemently urged that the learned Trial Judge proceeded on a wrong assumption that the case pertains to the misappropriation of stock of gum but in fact stock of gum was nill when earlier physical verification carried out. Therefore, the order of acquittal is bad in law. It was also urged that the complainant was examined in this case at Exh.10 and he had in his chief-examination proved the case and merely because the stock registers are not produced, it cannot be said that the offence is not proved against the accused. It was stated that vide Exh.12, office copy of confirmation letter addressed to the Managing Director by the complainant is produced. Exh.13 also an office copy of the letter addressed by the Managing Director to accused is produced. Exh.14 is an office copy of the

letter addressed by the present complainant to the Managing Director, is produced. These letters denote that what was the stock at the time of the physical verification and what was the stock in the stock register and, therefore, instead of insisting for the evidence of stock register, the learned Judge ought to have placed reliance on these letters Exh. 12, 13 and 14 to prove a fact that the less quantity of coal and honey was found from the accused on physical verification by the complainant. It is urged that on this count, the matter is required to be remanded for the re-trial, since the learned Judge has not taken into consideration this important evidence. It was urged that at Exh.15, a panchnama, drawn by the complainant on 5th June, 1990 is produced, which was drawn in the presence of panchas. This evidence also is brushed aside by the Trial Court which denotes that what was the stock as per the stock register, and what was found on physical verification on 20th May, 1990 by the complainant. It was stated that without objection this document was exhibited and the contents therein should be considered to be proved because at that juncture the exhibiting of the document was not objected by the accused. It was urged that since this document has not been taken into consideration by the learned Trial Judge, re-trial be ordered and the Trial Court be directed to consider these documents. In this respect, learned Advocate for the applicant cited the case of RAKHALDAS PRAMANICK vs. SMT. SHANTILATA GHOSE, reported in AIR 1956 Cal. 619 and in the matter of P.C. PURUSHOTHAMA REDDIAR vs. S. PERUMAL, reported in AIR 1972 SC 608. It was further argued that in this case, there is a confession of the accused duly recorded by the complainant, which are produced at Exhs. 11 and 17 on the record of the Trial Court. The Magistrate failed to consider the confession of the accused. These two documents are sufficient to convict the accused for the offence charged against him. It was urged that in cross-examination of the complainant by putting suggestions by the accused, the complainant has denied that the confession was recorded by threat or by promise and the same was not voluntary confession. The complainant has denied this allegation and therefore it is proved that these confessions are enough evidence to connect the accused with the crime and the same are voluntarily by the accused. Without any reasonable cause, the Magistrate had simply brushed aside the evidence of confession merely saying that the same appears to have been made by promise proceeding from a person in authority for not proceeding against the accused in criminal prosecution, but there is no such evidence on record. The conclusion of the Trial Judge,

according to the learned Advocate for the applicant, is perverse necessitating remand of the case and reconsideration of the evidence. It is urged that therefore there was enough evidence to convict the accused for the offence charged against him. The learned Trial Judge did not take into consideration the evidence produced by the prosecution as mentioned above. This evidence is a documentary evidence and in the shape of confession of the accused. The order of the Magistrate is, therefore, perverse that the Magistrate instead of taking into consideration this evidence, proceeded to determine the case on the basis of the stock of gum and acquitted the accused. It was urged that in these circumstances, retrial is required to be ordered.

6. Learned Advocate for the respondent No.1 Mr. Y.S. Lakhani has argued that the letters produced by the prosecution vide Exhs. 12, 13 and 14 are letters written by the complainant to the Managing Director. The stock which reflects in the letters, is the stock as mentioned in the stock register as admitted by the complainant. The stock register is not produced by the prosecution to prove that what was the stock at the time of the physical verification as noted in the stock register. In this view of the matter, Exhs. 12, 13 and 14, the copies of the letters cannot be called as an evidence to prove the case beyond reasonable doubt. It was further urged that confession of the accused, which is placed at Exh. 17 is hit by Section 24 of the Indian Evidence Act because the confession is recorded by the complainant who was the person in authority, and on earlier occasion, it has come in the evidence, that in such circumstances recovery was ordered from the accused instead prosecution. The court was right in coming to the conclusion that the confession was inducement and the proceeding from the promise not to prosecute the accused and, therefore, it cannot be said that the finding of the learned Magistrate is perverse in this regard because the Magistrate has considered the confession at Exh. 17 in its real perspective. It was urged that this is not a case wherein the State has preferred the Appeal. In fact, the complainant has come before this Court in revisional jurisdiction where this court has no power to convert the acquittal into conviction. The submission of the learned Advocate for the petitioner to remand the case for re-trial is also unreasonable because there is nothing in the finding which is contrary to the evidence on record, or contrary to law applicable to the facts of the case. The prosecution cannot be allowed to fill up lacuna in evidence on the pretext of re-trial of the accused, which is exactly sought by the original complainant and the

State has not filed any Appeal. It was further argued that the confession Exh. 11 as well as 17 are the confession before the complainant who was interested to see that the accused is convicted and, therefore, it cannot be said to be a voluntary confession of the accused. In fact, it was, argued that there is no evidence on record that what was the stock in the stock register when the physical verification was carried on 20th May, 1990. This fact is required to be proved beyond reasonable doubt by prosecution, which the prosecution failed to prove. It was urged that, the Trial Court rightly did not place any reliance on the panchnama because panchas were not examined. It was urged that the case is of the year 1990 and the order impugned is dated 18th June, 1998 and in these circumstances if the re-trial is ordered, the accused will be prejudiced. It was therefore urged that the revision be dismissed.

7. Learned APP Mr. B.Y. Mankad on behalf of the State - Respondent No.2 was heard.

8. The controversy in the matter revolves around the short question that whether the prosecution was able to adduce sufficient evidence as to book the accused for the conviction under Section 409 of the Indian Penal Code, and whether the finding of acquittal of the Magistrate is so perverse not based on evidence as to result in miscarriage of justice.

9. The prosecution case as has been disclosed by the complainant and the charge sheet filed by the Police pertains to the physical verification carried out in September, 1989 and there were 9,000 bags of coal in the stock register, and on physical verification 3,325 bags of coal were found. The departmental proceedings was initiated. The accused was asked to make the payment for the stock, which was found less from the physical verification. After that physical verification, on 22nd May, 1990, another physical verification of stock kept by the accused was carried out where it was found that there were only 300 bags of coal instead 3,325, and there was only 17.90 quintals of honey instead of 62.69 quintal. Hence the complaint has been filed. It was the prime duty of the prosecution to prove that what was the stock in the stock register at the time of physical verification on 22nd May, 1990. It was also the prime duty of the prosecution to prove beyond reasonable doubt that it was the duty of the accused to collect the forest produce and to stock it in a godown after entering the same in stock register. The complainant in the complaint

has admitted that the appointment order of the accused denoting the duties will be produced during investigation. In deposition also the complainant admits that the order of appointment defines the duties of the accused to collect the forest produce and the same was in the file of the complainant Corporation and yet the same has not been produced. In absence of the stock register in evidence and the duties assigned to the accused to collect the forest produce, the prosecution fails to prove the case against the accused to the extent that the property complained of was entrusted to the accused or he had domain over the property. Exhs. 12, 13 and 14 are the letters written by the complainant to superior officer denoting the stock. These letters are dependent upon the stock register and by no stretch of reasoning, it can be said that these letters are enough evidence to denote that what was the stock on the date of the physical verification as noted in the stock register. More so when the complainant admits that the stock register is kept by the Corporation at two places i.e. at the place of stocking and at Rajkot Office, the prosecution must prove its case by producing stock register and beyond reasonable doubt. The letters Exh.12, 13 and 14 is nothing but the intimation by the complainant to the superiors, but when the criminal liability is fastened on the accused it was for the prosecution to produce stock register kept regularly by them as deposed by the complainant. In absence of the best evidence of stock register, the letters Exh. 12, 13 and 14 which are dependent upon the stock register and in the form of intimation by an Officer to his superior officer is not sufficient evidence to prove the fact that the property which is complained of to be misappropriated by the accused, was entrusted to the accused or the accused had domain over the same. The learned Trial Judge has rightly not placed any reliance on Exh. 12, 13 and 14 letters for the above reason. The learned Magistrate was not required to take those letters into consideration in absence of the stock register when it was an admitted fact that the stock register was very well maintained.

10. The learned Magistrate also committed no error in coming to the conclusion that the panchnama was not substantial evidence. Learned Advocate for the applicant has cited a decision of the High Court of Calcutta, in the case of RAKHALDAS PRAMANICK vs. SM. SHANTILATA GHOSE reported in 1956 Calcutta 619, wherein it is observed exhibit means a document exhibited for the purpose of being taken into consideration in deciding some question or other in respect of the proceeding in

which it is filed. Learned Advocate for the petitioner has also relied upon a decision of the Supreme Court in the matter of P.C. PURUSHOTHAMA REDDIAR vs. S. PERUMAL, reported in AIR 1972 SC 608, wherein the Supreme Court in para 18 observed that once a document is properly admitted the contents of that document are also admitted in evidence though those contents may not be conclusive evidence.

11. Now, as per the established law, the panchnama is a statement of the panchas as recorded before some authority. It is not a statement of a person who has drawn the panchnama. In this case, panchnama Exh. 15 was drawn on 5th June, 1990 wherein the stock as was found in the custody of the accused was noted in the presence of two panchas and two witnesses. Mere exhibiting of a document is not the proof of the execution of the said document. So far as the panchnama is concerned, it is an established law that the panchnama itself is not a substantial piece of evidence because the panchnama is nothing but the statement of the panchas in the presence of some authority. Therefore, unless and until, the panchas of the panchnama are examined, no evidentiary value can be attached to such panchnama, even if the same is exhibited because panchnama is not the substantive evidence and the substantive evidence is of the panchas, whose statements are recorded in the panchnama in the presence of some other persons. The panchnama cannot be said to have been proved even if the person states that the panchnama was drawn in his presence because substantial evidence would be of the statement of the panchas in the panchnama. Therefore, the fact that the panchnama of panchas made statement before some persons as noted in the panchnama, is required to be proved by the prosecution beyond reasonable doubt. Unless this is done, the facts stated in the panchnama cannot be said to have been proved. Admittedly, in this case none of the panchas of the panchnama Exh.15 has been examined and, therefore, the learned Magistrate was right in not taking the panchnama into consideration on the ground that the panchnama itself is not substantive piece of evidence, even if the same is exhibited, and that too, without objection of the other side. In that view of the matter, the above two decisions would not be helpful to the present petitioner. In this case, in the absence of the examination of the panchas, it cannot be said that the contents of the panchnama are proved. Therefore, the conclusion and the finding of the Magistrate cannot be assailed on the ground that the finding was perverse because this fact was not taken into consideration by the learned Trial

Judge.

12. The only evidence after appreciating the above facts which the prosecution adduced was the evidence of the confession of the accused. The one of such confession is produced at Exh.12, and the other at Exh. 17. So far as Exh.12 is concerned, it is dated 29.9.1989 and perhaps not pertaining to the subject matter for which the complaint is filed. While Exh. 17 is in fact the reply of the accused in the presence of the complainant Project Manager on 6th June, 1990. In his reply, the accused had admitted that in the stock, he had 56.16 quintals of honey in 234 tins. It is also stated that on weighing the honey by the complainant in 92 tins only 17.90 quintals of honey was found, and there was a loss of about 38 quintals of honey. It is also stated in the reply that honey was mortgaged by the complainant because he was heavily indebted. What is now required to be considered is whether Exh.17 is said to be the confession in view of Section 24 of the Evidence Act. Section 24 clearly lays down that if it appears to the court that the confession is made by any inducement, threat or promise, having reference to the charges against the accused person proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him, then the said confession cannot be said to have been voluntarily made by the accused and the same will be irrelevant in criminal prosecution. In this matter there is an evidence that on earlier occasion for the loss of stock on physical verification, on initiating the departmental proceedings, the accused was ordered to make good the loss by making the payment equivalent to the loss. The important fact which is required to be noted here that it is the duty of the prosecution to prove that the confession of the accused was voluntarily and not caused by inducement, threat or promise. While going through the examination of chief of the complainant, nowhere even stated that the Exh.17 was voluntarily disclosure by the accused before the complainant. On the contrary, the facts revealed that accused was called by the complainant in the guest house and departmental proceedings appears to have been instituted and in that process, the reply of the accused was recorded by the complainant. The confession Exh.17 undoubtedly is before a person in authority because the complainant is superior officer of the accused. The accused is called by the complainant at the guest house. There is a precedent that on earlier

occasion instead of filing a criminal prosecution, the accused was ordered to make good the payment of the loss. The stock of the honey mentioned in Exh.17 is not tallying with the stock as mentioned by the complainant in the complaint and in the deposition. Besides, no stock register is produced by the prosecution. Mere suggestions on behalf of the accused and the reply of the complainant and denial that the confession was voluntarily and not caused by inducement, threat or promise, would not fasten the liability on the accused in respect of the confession. Undoubtedly, the prosecution is required to prove that the confession was caused not by inducement, threat or promise. Nowhere this fact is proved by the prosecution. Even the complainant is examined vide Exh. 10. Whatever the complainant stated is Exh. 17, was signed by the accused and signed by him. This evidence is not enough to establish that the confession under question was voluntarily one, and not caused by inducement, threat or promise and that the suggestions put by the accused in the cross-examination cannot be resorted by the prosecution as an evidence to denote that the prosecution had proved that confession was voluntarily. In these circumstances, when there was no stock register available for appreciation as to prove that what stock was entrusted to accused, the quantity of honey in the deposition and the confession of the accused differs, when there was an earlier precedent, as said above, and when the confession was before the person in authority, it was regarded as reply in departmental proceeding, the confession cannot be said to have been proved to be voluntarily. The learned Magistrate has dealt with this aspect and after considering, the learned Magistrate came to the finding that it appears to the court that the confession was under the impression that the accused would gain the advantage that the recovery would be ordered, and no prosecution would be initiated. In this view of the matter, in view of the above mentioned discussion, the finding of the learned Magistrate are not perversed as argued on behalf of the applicant that Exh. 17 has not been taken into consideration by the learned Magistrate to come to the right conclusion in the circumstances of the case.

13. The learned Trial Judge has not brushed aside any documentary evidence on record as has been argued on behalf of the petitioner but it is the case wherein the prosecution was not able to prove the case against the accused beyond reasonable doubt by cogent and best evidence though was available and was in the custody of the complainant. The evidence was properly appreciated by the Magistrate and in these circumstances, there are

no grounds at all to remand the case for re-trial.

14. In this view of the matter, this Revision fails and is dismissed. Rule is discharged.

p.n.nair (J.R.Vora, J.)